

Appendix B

1 THE COURT: All right. Let's take a
2 recess.

3 *(Short break)*

4 THE COURT: Mr. Jorgensen.

5 MR. JORGENSEN: Thank you, Your Honor.
6 I love this case and I appreciate the opportunity to
7 argue in front of you.

8 So thanks to Mr. Baker -- and I appreciate
9 the help because it moves us along -- we have gotten
10 to the point where I think we all agree that the state
11 had not only to prove that each individual actor that
12 put down poultry litter acted unreasonably, in an
13 unwarranted manner, or unlawfully, but that they did
14 so intending to cause a nuisance or recognizing that
15 their conduct was going to cause a nuisance. That's
16 the intentional part.

17 Do you want to go back to that slide?

18 THE COURT: Well, but isn't the focus
19 here on the intentional tort on the defendants, and
20 then they're using 427(b) to bootstrap into the
21 foreseeable consequences? But the intentional aspect
22 is the alleged intent of the defendant integrators;
23 correct? And I'm seeing plaintiff's counsel
24 affirmatively nod.

25 MR. JORGENSEN: I would make the

1 argument, Your Honor, that if the person who is making
2 the decision about where to put the poultry litter,
3 how much to put down, and what to do, that the law
4 would go to their intent, and then we could be
5 vicariously liable for their intent.

6 THE COURT: All right. I think we got a
7 difference of legal opinion there. Go ahead.

8 MR. JORGENSEN: So even if it's us,
9 either way, it doesn't matter. Because the point is,
10 I'm going to evidence, or rather the lack thereof.

11 What evidence is there in the record that
12 either the growers or we acted in an unwarranted,
13 unlawful, or unreasonable manner in doing precisely on
14 a field-by-field basis what soil scientists sent to
15 the state -- sent by the state to those fields told us
16 to do? And that's really the end of it.

17 So we have had some suggestion in this
18 case -- and I want to put it to bed finally at this
19 point -- there has been some suggestion in this case
20 that the people who do the plan writing and the
21 checking up on the plans, the inspectors, that they
22 are not to be trusted. And even though each one of
23 those individuals works for the plaintiff, the
24 plaintiff suggested that, although the plaintiff did
25 not put any of them on the stand. So let's look to

1 what the -- what was said on the stand about these
2 individuals.

3 And Ms. Gunter said, "Well, do you
4 agree that" -- rather this is the question to her --
5 "Well, do you agree that, in any event, the plan
6 writers have to understand the soils and they have to
7 understand the fields on which the litter is proposed
8 to be applied; right?"

9 "Yes."

10 "And they have to develop procedures and
11 processes for land application that are individualized
12 to the specific fields and properties on which litter
13 is going to be applied, correct?"

14 And she said, "That's correct."

15 I'm not going to reread the presumption of
16 regularity; Mr. Todd went through it. But I just
17 think it's improper to have a lawyer-offered
18 suggestion that these people are not to be trusted
19 when every witness said they come, they look, they
20 inspect, and I rely on them.

21 Let's go to the next slide.

22 Here's an important one. You've got a lot of
23 these in the record, Your Honor. These are the annual
24 inspections that you heard a lot about John
25 Littlefield who works for the state, yet the state

1 failed to put on. About how he comes to people's
2 farms and about how when he's there, he checks the
3 date of the Animal Waste Management Plan -- here it
4 is -- and he notes here that the person has applied
5 for a new plan. He notes the date of their soil test,
6 the dates of their litter test. He notes whether
7 they're in a nutrient-vulnerable area.

8 And then he checks, is the AWMP available for
9 review? All of the ones that came in to you were yes.
10 And were all of the procedures in the Animal Waste
11 Management Plan higher?

12 This is the state's evidence to you that
13 there has been a terrible violation here, it's the
14 evidence of their own employee going by farm to farm
15 and checking the Animal Waste Management Plans that
16 the state gave to these people have been followed.

17 Let's go to the next slide.

18 This is just more of the same. This is just
19 Jim Pigeon being checked up on every year by the
20 plaintiff and the plaintiff deciding every year that
21 he is following exactly what they tell him.

22 For the record, Your Honor, this is -- I'm
23 not sure this is noted on the slide so I need to say
24 it. The slide that you're looking at is Defendants'
25 Joint Exhibit 3404 and it is in evidence, DJX3404, but

1 the court has 3405 and others as well.

2 Let's go to the next slide.

3 So Roger Collins. Mr. Todd referred briefly
4 to this, but I think we have to read it out. So Roger
5 Collins, as you'll recall, was -- the state put him on
6 and he is a commercial litter applicator, and the
7 question was essentially are farmers just trying to
8 get rid of this stuff, just trying to dump it, because
9 that's the allegation that the state has given you.

10 And he said, "Just because it says that we
11 can" -- "it" meaning the law, the Animal Waste
12 Management Plans -- "we're allowed to go up to 300
13 doesn't mean we go up to 300 on our index just so we
14 can max it out every time. The cost of the litter has
15 elevated to the point where the consumer is very
16 conscious to make his operation cash flow and so,
17 therefore, he doesn't want to put any more on there
18 than what he has to put on there to make his grass
19 grow or his crops grow."

20 This stuff's worth money, and that's the
21 undisputed evidence before the court. And so there
22 really isn't a record of the stuff being -- of poultry
23 litter being overapplied.

24 Let's go to the next slide.

25 We don't need to spend anymore time on this.

1 It's -- you know, what is being done is being done
2 under the authority of a statute, and therefore, it
3 cannot be deemed a nuisance. But I didn't want to
4 leave the court with the impression that I had
5 cherry-picked the data. Look at all of the people and
6 the citations who testified that the law requires them
7 to follow site-specific plans drafted by the state
8 experts.

9 You'll find in those citations, Your Honor,
10 every one of these people, some of whom are growers,
11 some of whom are commercial litter applicators, some
12 of whom are representatives of the defendants, all
13 saying the same thing. I'm not a soil scientist. I
14 rely on the state to tell me what I can do.

15 Now, the question then would be for the
16 court? Is that an unreasonable, unwarranted, or
17 unlawful reliance? And I'll refer you back to Teena
18 Gunter's slides, which we won't show again, that it's
19 not because she actually tells people you can rely on
20 this. It's not something that people just adopt or
21 assume.

22 Okay. So while we're going through nuisance,
23 we have to turn to the concept that comes from the
24 lead paint cases. I've got one of the cases cited on
25 the screen, but it's throughout all of the recent

1 reversals of the lead paint complaints.

2 The point of those reversals is that the
3 defendant has to have control over the instrumentality
4 causing the alleged nuisance at the time the damage
5 occurs. So the reason the lead paint companies were
6 not held liable is they sold lead paint in the '70s,
7 but then that same day the person took the lead paint
8 home with them and that person decided how to apply
9 it, where to apply it, and what to do. It can be done
10 in a safe manner, lead paint can be put on, and can
11 then be maintained in a safe manner. It's often not;
12 hence, the nuisance.

13 But the reason that all the lead paint cases
14 turned out this way is because the lead paint
15 companies did not have control over the specific site,
16 the decisions about what to put down, where to put
17 down, how to put it down. It might as well be poultry
18 litter; it's very apt.

19 So every grower and company representative
20 called by the state testified that the growers own
21 their litter and that it's always been that way; that
22 the growers keep the money when they sell their
23 litter; that the integrator with whom they contract
24 has no say in how or when the grower uses, sells,
25 trades his or her litter other than to require the

1 grower to comply with state law; that the grower
2 decides when, where, and how much litter to use,
3 subject to their Animal Waste Management Plan which
4 they get from the state; and that the company service
5 tech does not give advice on litter.

6 That's the undisputed evidence, the best
7 evidence that the state could put forward of who bears
8 the burden of proof on control of the alleged nuisance
9 causing instrumentality at the time of the nuisance.

10 Let's go to the next slide.

11 I'm not going to take the time to read all
12 those. I just thought it might be helpful, Your
13 Honor, if I marshaled a few of the citations from
14 growers and company representatives who said over and
15 over the same things that we just barely discussed.

16 Let's go to Dr. Taylor. Even the state's
17 paid experts conceded this. "As far as you know,
18 growers have always decided what to do with their
19 litter; isn't that right?"

20 Now, Mr. Todd talked a little bit about this,
21 but it has application here because of the rule that
22 you have to have control over the instrumentality at
23 the time the nuisance is created or allegedly created.

24 And then the answer was, "That they've
25 decided what to do with 'the' litter."

1 And then the question: "I'm not going to
2 quibble with you about semantics. The growers decide
3 whether to sell it or whether to land apply it or
4 whether to give it away, right?"

5 "Right."

6 "Now, with regard to the integrators and the
7 litter and the growers and the litter, from those
8 depositions -- or from that testimony that you read,
9 did you reach an understanding that the growers
10 rightly or wrongly" -- and this goes to
11 intent -- "believe that the litter is theirs to do
12 with as they choose?"

13 "Historically, they believe that it has been
14 theirs to do with what they please, yes."

15 "Nowhere in your report or in today's
16 opinions have you offered an opinion that the
17 integrators own, control, or decide what happens with
18 litter; is that correct?"

19 "Except with regard to Peterson Farms'
20 contract that says the grower owns it."

21 So the state brought forward for its burden
22 of proof the evidence that the companies owned the
23 litter, and the only evidence that they had was that
24 Peterson Farms affirmatively says that the growers own
25 it.

1 "Okay. Apart from the Peterson contract,
2 you've offered no opinions regarding the control of
3 litter?"

4 "No."

5 "But your opinion remains that even dispute
6 that opinion, the grower determines what occurs with
7 the litter, what happens with the litter?"

8 And the state concedes, "Yes." The grower
9 determines.

10 All right. So when a point is well-ingrained
11 in the law, you see it said over and over again. And
12 so here, we're just saying from Okla. Stat. Sec. 1.1
13 the same thing we've seen said different ways
14 throughout this presentation.

15 If an agricultural activity is undertaken in
16 conformity with federal, state, and local laws and
17 regulations, it is presumed to be good agricultural
18 practice and not adversely affecting the public health
19 and safety.

20 And why does that matter? Because above it
21 says that agricultural activities conducted on farm or
22 ranch land, if consistent with good agricultural
23 practices -- that's what we have down below -- and
24 established prior to nearby nonagricultural
25 activities, are presumed to be reasonable and do not

1 constitute a nuisance.

2 We don't have to rely on this. This is just
3 another way of saying unreasonable, unwarranted,
4 unlawful to apply one ton per acre of litter when the
5 state gives you an Animal Waste Management Plan that
6 says you can apply two.

7 Let's skip that one; we've done it enough.

8 Okay. We had some confusion over this in the
9 pretrial argument so I wanted to just talk about it
10 again.

11 What is the effect of the fact that the
12 state, the plaintiff in this case, authorizes the
13 field-specific applications of poultry litter?

14 The effect of that is that the state cannot,
15 as a matter of law, seek an injunction to prohibit
16 under nuisance that which they authorize.

17 Now, because a private litigant is not the
18 person giving authorization, if somebody wanted to sue
19 based on private nuisance and say, you know, my
20 property values have been diminished next door, I want
21 money, that person gets to sue. But the state
22 authorization precludes the state from obtaining an
23 injunction, and that's just good sense.

24 Like we talked about a moment ago, these
25 principles of law when they're right they all overlap.

1 That's the same principle from the equitable
2 injunction cases that we talked about before.

3 So let's switch to federal public nuisance.

4 Your Honor, did you have any questions on
5 state law intentional public nuisance?

6 THE COURT: No, sir.

7 MR. JORGENSEN: Okay. Federal public
8 nuisance. So the federal public nuisance is there's
9 not a ton of cases. There's recently been some out of
10 the Second Circuit and elsewhere based on global
11 warming but there's not a ton.

12 So what they say, though, is that the
13 Restatement of Torts is a good place to look for
14 defining public nuisance. And, of course, it defines
15 public nuisance as unreasonable interference with a
16 right common to the general public.

17 And I thank Mr. Baker because he pointed out
18 that in the pretrial order the state concedes this
19 claim as well as an intentional nuisance claim. So
20 recall that point about not only needing to prove the
21 state's burden that this is unreasonable what has been
22 done, unreasonable to follow the plans that have been
23 given, but also intentional.

24 So what's the effect of the regulatory
25 scheme? Your Honor had a discussion with Mr. Todd,

1 which I wholeheartedly endorse, which is there's no
2 way a state law can overcome or control a federal law
3 or set aside a federal law because of the application
4 of the supremacy clause of the constitution. Federal
5 law always controls.

6 But that doesn't mean that federal law never
7 looks to state law for its standard, never says that
8 if you're complying with state law, you've complied.
9 And this is one of those instances.

10 The Restatement, again, on public nuisance
11 says, "If there has been established a comprehensive
12 set of legislative acts or administrative regulations
13 governing the details of a particular kind of conduct,
14 the courts are slow to declare an activity to be a
15 public nuisance if it complies with the regulations."

16 And, "In considering a nuisance claim, courts
17 should examine the fact that acts were taken in
18 reliance upon legislation." That just makes common
19 sense as to whether or not what a person did is
20 unreasonable as the federal standard would judge it.

21 I submit if Mr. Todd were a grower and on his
22 own he invited soil scientists to come to his farm and
23 tell him what he needed to put down on the field, that
24 would be pretty good evidence of reasonableness. It
25 doesn't -- it's not so much that the state sent them

1 when we're talking about federal public nuisance, it's
2 that it was done in compliance with this system and
3 this system set up a standard and Mr. Todd complied
4 with the standard.

5 So the state regulations provide the
6 appropriate standard of conduct for analyzing the
7 federal common law claim -- and this is important --
8 and the state cannot prevail on both its state common
9 law claim and its federal common law claim; it's one
10 or the other. Actually, they can't prevail on either
11 one of them, but at a minimum they can't for
12 evidentiary and all the legal reasons we just went
13 over. But even if they could, it would be one or the
14 other.

15 The Supreme Court has said that if state can
16 be applied, there's no need for federal common law.
17 The court remembers the Supreme Court's injunction to
18 keep federal common law as limited as possible.

19 THE COURT: Well, once again here,
20 because of the complexity provided by the state line,
21 at least arguably, if you're correct there, then
22 Oklahoma law would apply west of the state line and
23 arguably federal common law, if it applies, could
24 apply east of the state line?

25 MR. JORGENSEN: Indeed. Indeed that

1 could be right. But let's go back one side.

2 That would only be if the people who acted in
3 Arkansas had not acted under a comprehensive set of
4 legislative acts or administrative regulations
5 governing the details of their particular kind of
6 conduct which establishes that they acted not
7 unreasonably. We, the defendants, acted not
8 unreasonably in allowing growers to follow the state
9 law and telling growers -- I think we've been
10 criticized in this case that we say to growers, you
11 need to follow the state law. That's the most
12 reasonable thing we could do.

13 I mean, I'm sure the court does not want to
14 say, you shouldn't tell your independent contractors
15 that they need to comply with the state law.

16 So let's go to slide 39. This is Teena
17 Gunter.

18 "With regard to these plan writers, today you
19 said that there are a couple of plan writers that are
20 subcontractors or contracted out by the State."

21 She said, "They're independent contractors."

22 "Mr. Hopson talked to you a bit about the
23 fact that they have to be trained," meaning the people
24 who write Oklahoma's plans. "These are not just folks
25 that would like to have a job, right? These plan

1 writers are trained persons?"

2 "Yes, they are. They have expertise."

3 There's no evidence in this record to suggest
4 that the Arkansas plan writers are any different.

5 So finally, if I can conclude, the law is
6 being followed. The state adduced no evidence that
7 anybody did not follow precisely what a state officer,
8 whether Arkansas or Oklahoma, told them to do. They
9 adduced no evidence that Arkansas is some evil actor
10 that is in the thrall of the poultry companies. That
11 has been alleged by lawyers in this case, but now the
12 day of truth and evidence has come, and there was no
13 evidence to that.

14 Do you have any questions, Your Honor?

15 THE COURT: I don't.

16 MR. JORGENSEN: Thank you, sir.

17 THE COURT: Thank you. Response,
18 Mr. Baker, with regard to nuisance?

19 MR. BAKER: If I may, Your Honor, can I
20 hear the -- the way my presentation is set up it flows
21 sort of throughout.

22 THE COURT: I understand. Because of
23 427(b)?

24 MR. BAKER: And to slice and dice it is
25 going to make it very difficult for me to have sort of

1 a continuum in my preparation.

2 THE COURT: Well, I understand the way
3 this is cut. Let me ask you perhaps the easiest
4 question.

5 With regard to nuisance per se, isn't it
6 clear that the motion ought to be granted with regard
7 to nuisance per se?

8 MR. BAKER: I don't want to go down
9 swinging hard on this, but we believe -- we believed
10 there is a claim for nuisance per se. That the fact
11 the matter is --

12 THE COURT: There's no question there's
13 a claim there. The question is whether or not it
14 ought to be dismissed or a judgment ought to be
15 granted.

16 MR. BAKER: I believe the evidence shows
17 that poultry waste when land-applied in the IRW always
18 runs off, there's going to be always some fraction of
19 the phosphorus that always runs off; therefore, the
20 evidence would support a nuisance per se claim.

21 That said, because of Your Honor's ruling on
22 RCRA and trying to draw lines, what we did is we're
23 trying to find a common denominator between our
24 various claims. And so we are adopting a 65 standard
25 for the relief that we're seeking as an injunctive

1 remedy, and that would, I believe, Your Honor, create
2 difficulties for our nuisance per se claim.

3 THE COURT: I agree. It would seem to
4 me that the motion for judgment should be granted with
5 regard to the nuisance per se claim. We'll further
6 review the other arguments and to give Mr. Baker an
7 opportunity to present, I take it, his 427 argument,
8 together with the response to the nuisance argument.

9 Mr. Jorgensen.

10 MR. JORGENSEN: Yes, Your Honor. May
11 we -- staying with Mr. Baker's baseball theme, may we
12 bat cleanup?

13 Your Honor noted that the pretrial order
14 governs in this court, and therefore, I have been
15 through the pretrial order and see no reference to
16 arsenic, copper, zinc, those other materials
17 causing -- allegedly causing injury, so I believe
18 they're gone. I would --

19 THE COURT: You've had an opportunity to
20 look through it all?

21 MR. JORGENSEN: Yes, Your Honor. I have
22 the benefit of keyword searching.

23 THE COURT: All right.

24 MR. JORGENSEN: Yes. But "bacteria" is
25 mentioned -- and I'm just going to turn this over to

1 Mr. Elrod -- "bacteria" is mentioned --

2 THE COURT: Second paragraph of the
3 second page.

4 MR. JORGENSEN: Oh, and throughout. I'm
5 going to let him read them out.

6 So we do need a -- there was no evidence on
7 bacteria. So we would urge you at this time to grant
8 judgment on bacteria so that we don't have to bring in
9 bacteriologists to tell you all about bacterial that
10 you didn't hear about it.

11 But I'll turn it over to Mr. Elrod to read
12 out the places that it mentions "bacteria."

13 MR. ELROD: Judge, Jennifer Pfizer of
14 the Bassett firm was kind enough to look through the
15 pretrial order and -- I mean, there's -- I can take
16 five minutes, but it's replete throughout, bacteria
17 and pathogens.

18 THE COURT: For the record, why don't
19 you --

20 MR. ELROD: All right. Your Honor,
21 pathogens are mentioned at page 30, paragraph 23; page
22 34, paragraph 63 --

23 MR. JORGENSEN: Go a little bit
24 slower.

25 MR. ELROD: Okay. Page 34, paragraph

1 63; 39, paragraphs 45, 46, and 47. Bacteria generally
2 is -- the word "bacteria" occurs at page 2, the second
3 paragraph; 6, paragraph 3; 8, paragraph 23; 13,
4 paragraph 72; 16, paragraph 13; 17, paragraph 16A; 24,
5 paragraph 65; 27, paragraph 966; 31, paragraph 34; 31,
6 paragraph 40; 33, paragraph 59; 39, paragraphs 43, 44,
7 49, and 50; 40, paragraphs 51, 53, 55, 56A, 58, and
8 59; page 41, paragraph 69, 70, 71, 72, 73, and 78; and
9 finally, page 42, paragraph 79.

10 So given that notion, Your Honor, and those
11 inclusions, we again would move the court for motion
12 for partial judgment on all human health claims as
13 they cut across any cause of action.

14 THE COURT: Any response, Mr. Baker?

15 MR. BAKER: Well, a few things, Your
16 Honor.

17 First of all, as I noted earlier, while
18 Mr. Elrod has moved for judgment on all of our
19 health-related claims, I did point out that we do have
20 phosphorus-related, health-related claims. So I think
21 that, first of all, is overexpansive.

22 Secondly --

23 THE COURT: I think he's focusing on
24 bacteria here.

25 MR. BAKER: Right. But the way he

1 phrased it, I want it to be clear on the record.

2 THE COURT: I agree.

3 MR. BAKER: The second point I would
4 make is is that there is some evidence, albeit not a
5 lot, of a bacterial injury. For example, we have the
6 303(d) list that came in, and the 2008 one, I believe,
7 states impairments for bacteria from poultry waste.

8 Well, it says impairments from land-applied wastes
9 and -- I forgot what the other category was.

10 Admittedly, there's not a lot of evidence in the
11 record on this point.

12 THE COURT: I think the point is, as
13 Mr. Jorgensen pointed out, there is some evidence in
14 this record. If this was before a jury, I wouldn't
15 grant judgment, but the standard is a bit different
16 for 52(c).

17 It seems to me that in order to streamline
18 this matter, the motion for judgment under Rule 52(c)
19 because of the dearth of evidence -- and by "dearth,"
20 I don't mean there's none at all -- but the case has
21 not been made -- or the plaintiff did not carry its
22 burden of proof with regard to bacteria.

23 The explanation comes in the statement
24 previously made, I think by Mr. Bullock, which makes
25 some practical sense, that if the case is made with

1 regard to phosphorus, there's no need to focus on
2 bacteria.

3 But in order to allow this case to proceed a
4 bit more quickly, because the defendants would be
5 obligated to present bacterial experts and witnesses,
6 the motion for judgment is granted with regard to any
7 bacterial claim.

8 MR. BAKER: Yes, Your Honor.

9 THE COURT: Go ahead.

10 MR. ELROD: Thank you, Your Honor.

11 THE COURT: Mr. Todd.

12 MR. TODD: Your Honor, continuing with
13 the cleanup theme, just to go back to RCRA for just
14 one second.

15 THE COURT: Yes, sir.

16 MR. TODD: To the extent that the court
17 is interested in the *Seaboard Farms* issue, we've got a
18 copy of the administrative order for Your Honor. It
19 was attached --

20 THE COURT: But that's an administrative
21 order from whence the complaint derived or an
22 administrative order following the complaint?

23 MR. TODD: It was an administrative
24 order issued by EPA Region 6 to Seaboard Farms --

25 THE COURT: Which Seaboard did not

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel.)
W.A. DREW EDMONDSON, in his)
capacity as ATTORNEY GENERAL)
OF THE STATE OF OKLAHOMA,)
et al.)
)
Plaintiffs,)
vs.) CASE NO. 05-329-GKF-PJC
)
TYSON FOODS, INC., et al.,)
)
)
Defendants.)

TRANSCRIPT OF NONJURY TRIAL PROCEEDINGS
DECEMBER 15, 2009
BEFORE GREGORY K. FRIZZELL, U.S. DISTRICT JUDGE
VOLUME 72, A.M. SESSION

APPEARANCES:

For the Plaintiffs: MR. W.A. DREW EDMONDSON
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1 been hashed out here that the focus is on what the
2 integrators' intent was relative to these matters.

3 So with due respect, the motion for
4 judgment on the claim of trespass is denied.

5 I'm going to take a few minutes, and the
6 court will put together its notes with regard to the
7 RCRA claim and we'll be back.

8 (Whereupon a recess was had.)

9 THE COURT: Do I understand correctly that
10 all argument with regard to the RCRA motion for
11 judgment has been made?

12 MR. TODD: Yes, Your Honor.

13 MR. BAKER: Except with respect to
14 causation.

15 THE COURT: Yes, I'm going to hold
16 causation out separately.

17 With regard to the RCRA claim, one of the
18 elements of such a claim under 42, United States
19 Code, Section 4972(A) is that the defendant
20 "contributed to, or is contributing to the handling,
21 storage, treatment, transportation, or disposal of
22 solid waste." The Tenth Circuit addressed that
23 matter in Burlington Northern and Sante Fe Railway
24 Company v. Grant, 505 F.3d 1013 at 1019 to -20.

25 Under RCRA, the term "solid waste" includes

1 material from agricultural operations only to the
2 extent that the material is "garbage, refuse, or
3 other discarded material" found at 42, United States
4 Code, Section 6903(27).

5 Material is considered to be "discarded"
6 where it is disposed of, thrown away, or abandoned.
7 That's found in American Petroleum Institute v. EPA
8 at 216 F.3d 50, pages 55, 56, D.C. Circuit 2000.

9 The term "discarded" cannot encompass
10 materials that are "destined for beneficial reuse or
11 recycling in a continuous process by the generating
12 industry itself," found at American Mining Congress
13 v. EPA, 824 F.2d 1177 and 1186, D.C. Circuit 1987.

14 In this case, the plaintiff has failed to
15 produce sufficient evidence that poultry litter is a
16 RCRA solid waste in the IRW. In other words,
17 there's been insufficient evidence on this record
18 that poultry litter is merely being "discarded" in
19 the sense of being thrown away or abandoned.

20 The record reflects that poultry litter has
21 a market value and has at least some beneficial
22 use. The growers largely intend to put it to
23 beneficial use, and the material has at least an
24 incidental beneficial effect in its usage. The
25 State here regulates -- the plaintiff itself

1 regulates its application in an attempt to allow
2 such beneficial use. As Mr. Todd argues, the fact
3 you have a high STP is not in itself evidence of a
4 "discard."

5 This court would note that it, however,
6 rejects the defendants' argument that poultry litter
7 is "returned to the soil" under this record in the
8 IRW as a fertilizer or soil conditioner in light of
9 the tons of pot ash imported into the IRW by the
10 defendant poultry integrators for incorporation into
11 their feed to strengthen the bones of their
12 chickens, much of which phosphorus finds its way
13 into the poultry litter and into the watershed.

14 The court was previously concerned, and one
15 of the reasons it denied the motion for summary
16 judgment had to do with the issues raised in the
17 Seaboard case by the United States Attorney,
18 immediate past United States Attorney and the EPA in
19 the Western District of Oklahoma. But in Seaboard,
20 the EPA was primarily concerned with effluent
21 leaking from the plastic-lined pits and the
22 infrastructure, including piping.

23 The focus was not on land application,
24 although the complaint mentioned land application of
25 swine effluent. The practice of land application

1 was merely the subject of an allegation in the
2 complaint and is not determinative on the legal
3 issue.

4 So the defendants' motion for judgment on
5 the RCRA claim is granted.

6 I believe that addresses all of the motions
7 that have been fully argued. We'll take the next
8 argument. Mr. McDaniel.

9 MR. MCDANIEL: Good morning, Your Honor.

10 THE COURT: Good morning.

11 MR. MCDANIEL: May it please the court,
12 Scott McDaniel for Peterson Farms. And I take the
13 podium, Your Honor, to move for judgment under Rule
14 52 on the State of Oklahoma's Count No. 7 against
15 all the defendants.

16 At the risk of stating the obvious, the
17 evidence in this case is basically one
18 undifferentiated presentation of facts and expert
19 opinions. But that evidence must be tailored and
20 must fit the elements of each one of these claims
21 that the State has pled. And in the case of Count
22 7, there is -- it is an especially poor fit. And
23 that's the reason we think that Count 7 is
24 particularly appropriate for the court's disposition
25 at this time.